A. Black & Co., Inc. and Local 277, International Brotherhood of Teamsters, AFL-CIO. Case 2– CA-25823

November 26, 1993

DECISION AND ORDER

By Chairman Stephens and Members Devaney and Raudabaugh

On September 3, 1993, Administrative Law Judge James F. Morton issued the attached decision. The General Counsel filed exceptions and a supporting brief

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, A. Black & Co., Inc., New York, New York, shall take the action set forth in the Order as modified.

- 1. Insert the following as new paragraph 2(b) and reletter the subsequent paragraphs.
- "(b) Notify the Union as to newly hired employees as required by the collective-bargaining agreement."
- 2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Local 277, International Brotherhood of Teamsters, AFL-CIO by failing to make contractually required welfare fund and pension fund payments for you and by failing to notify Local 277 when we hire employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make you whole with interest, and also the contractual benefit funds for any losses resulting from our failure to make payments to those funds.

WE WILL notify the Union as to newly hired employees as required by the collective-bargaining agreement.

A. BLACK & CO., INC.

Margit Reiner, Esq., for the General Counsel.

Ann Shulman, Esq. (Spivak, Lipton, Watanabe, Spivak & Moss), of New York, New York, for Local 277, International Brotherhood of Teamsters, AFL—CIO.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The amended complaint alleges that A. Black & Co., Inc. (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by having refused to bargain collectively with Local 277, International Brotherhood of Teamsters, AFL–CIO (the Union) in that it unilaterally modified parts of its collective-bargaining agreement with the Union. In particular, the Respondent is alleged to have failed to make required payments to benefit funds and failed to notify the Union that it had hired new employees, as required.

I heard this case in New York, New York, on August 10, 1993. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the General Counsel, I I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent has been engaged in the nonretail sale of floral supplies at its place of business in New York City. In its operations annually, it meets the Board's standard for asserting jurisdiction. I thus find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

¹ The correct citation to *Intermountain Rural Electric Assn.* in sec. III of the judge's decision is 305 NLRB 783 (1991).

²The General Counsel excepts only to the judge's failure to state in the remedy section of his decision and to include a provision in his recommended Order that the Respondent has the affirmative contractual duty to notify the Union of newly hired employees. We agree with the General Counsel's exceptions and shall modify the recommended Order accordingly.

¹ Virtually all of this brief relates to the answer filed by the Respondent to the complaint which averred that the Board's jurisdiction is preempted by "the Bankruptcy Laws." The brief cites *Frederick Iron & Steel*, 303 NLRB 514 (1991), in support of General Counsel's view that that averment lacks merit. Of more immediate relevance to the case before me is the decision in *Crest Litho*, 308 NLRB 108 (1992), also cited in General Counsel's brief and which, inter alia, makes clear that the Respondent has the burden of proving that it met the requirements of the Bankruptcy Code in seeking relief as to its conduct after a bankruptcy petition is filed. No one appeared at the hearing to represent the Respondent. No evidence thus was offered in support of the affirmative defense in the Respondent's answer, and I, therefore, find that it lacks merit.

II. LABOR ORGANIZATION

The testimony and documentary evidence offered by the General Counsel establish clearly that the Union is a labor organization as defined in Section 2(5) of the Act.²

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Union for many years has represented a unit of sales employees, packers, drivers, and porters employed by the Respondent at its place of business in New York City. Its most recent signed collective-bargaining agreement with the Respondent covering this unit was effective January 16, 1990, to January 15, 1993. I find that this unit is an appropriate unit for purposes of collective bargaining. *M. J. Santulli Mail Services*, 281 NLRB 1288, 1293–1294 (1986).

The above contract required the Respondent, inter alia, to make monthly contributions, on behalf of each unit employee, to both the trustees of the Teamsters Local 277 Welfare Fund (Welfare Fund) and the trustees of the Teamsters Local 277 Pension Fund (Pension Fund). The agreement further required the Respondent to notify the Union, on hiring new employees, of the dates such new employees are hired.

The unrebutted testimony discloses that the Respondent, in late 1991, laid off all but 3 of the approximately 12 unit employees and that, in early January 1992, it had several new employees working at its facility, doing the same type work as the unit employees did. The Union has never received notice from the Respondent that it had hired these new unit employees.

General Counsel proffered testimony and documentary evidence which were uncontroverted and which established that, in January 1992 and since, the Respondent has failed to remit to either the Welfare Fund or the Pension Fund any moneys for any of its employees in the unit described above who were working for it.

By failing to make such payments, the Respondent has engaged in unfair labor practices as defined in Section 8(a)(1) and (5) of the Act. See *Crest Litho*, supra.

By having unilaterally abrogated its contractual obligation to notify the Union as to newly hired employees, the Respondent has thereby engaged in an unfair labor practice under Section 8(a)(1) and (5) of the Act. Cf. *Intermountain*

Rural Electrical Assn., 305 NLRB 283 (1991), where the Board found that the employer there unlawfully had implemented changes in an established overtime policy.

The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be ordered to reimburse its unit employees for any expenses ensuing from its unlawful failure to make contractually required payments to the Welfare Fund and the Pension Fund. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980). Interest on amounts due unit employees shall be computed in the manner prescribed in *New Horizon for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be ordered to make the contractually required benefit fund payments it unlawfully failed to make, leaving to the compliance stage of this case the question whether the Respondent must pay any additional amounts into the funds in order to satisfy a "make-whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, A. Black & Co., Inc., New York, New York, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to bargain in good-faith with Local 277, International Brotherhood of Teamsters, AFL—CIO by failing to make contractually required payments to the trustees of the Local 277 Welfare Fund and to the trustees of the Local 277 Pension Fund for its employees in the appropriate bargaining unit of the Respondent's employees as set out in the collective-bargaining agreement between the Respondent and the Union, and by failing to notify the Union as to newly hired employees as it is obligated to do under the collective-bargaining agreement.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the the policies of the Act.
- (a) Make whole, in the manner set forth in the remedy section of this decision, unit employees and the Welfare and Pension Funds for losses resulting from the Respondent's failure to make the required payments to the respective trustees of those funds.
- (b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records

²The answer, filed on behalf of the Respondent by Robert M. Kerrigan, Esq., contained a frivolous denial of the allegation that the Union is a labor organization. It also frivolously denied, as is apparent from the uncontroverted evidence, that the contractual unit is appropriate and that the Respondent has failed to make benefit fund payments as required by its contract with the Union. Kerrigan's conduct, on that matter and on others, raises a serious question as to his capacity to represent clients before the Board, as the supplemental formal papers in evidence disclose. Kerrigan did not appear at the hearing and did not file a motion to withdraw. Instead he took it on himself to "tender his withdrawal" at the last minute. Yet he continued thereafter to write letters of protest. In one of those letters, he used a derogatory name, which he put in quotation marks, in place of the surname of a member of General Counsel's staff. He has never apologized for that. He offered late and different reasons for his purported unavailability to attend the hearing. He represented in one letter that he was unavailable for any "afternoon appointments" in the weeks of August 9 and August 20; yet he transmitted, via fax, two letters on the afternoon of August 9. A warning should be sent him that any similar conduct on his part will result in disciplinary action.

³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

A. BLACK & CO. 587

and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in New York city, copies of the attached notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for Region 2, after

being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''